

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2011 MSPB 41**

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Docket No. DC-0841-10-0389-I-1

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**William N. Barth,  
Appellant,  
v.  
Office of Personnel Management,  
Agency.**

March 21, 2011

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Michael W. Macomber, Esquire, Albany, New York, for the appellant.

Cynthia Reinhold, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 The Office of Personnel Management (OPM) has filed a petition for review of an initial decision that ordered OPM to process the appellant's request for a waiver of that portion of his Federal Employees' Retirement System (FERS) annuity that is based on credit for his military service for purposes of establishing the appellant's eligibility for Combat-Related Special Compensation (CRSC) benefits. For the reasons set forth below, we GRANT the petition for review and VACATE the initial decision.

## BACKGROUND

¶2 On February 26, 1971, the appellant retired from the United States Navy after 4 years and 4 months of active duty service as a Navy Seal due to a disabling combat-related injury he suffered while serving in Vietnam. Initial Appeal File (IAF), Tab 1 at 1-3; *id.*, Tab 6, Subtab 5 at 6, 8, 17. In December 1987, the appellant was appointed to a civil service position with the Department of the Navy and served until he retired from federal service on March 27, 1999, as a result of a disabling medical condition for which he was granted a disability retirement annuity under FERS. IAF, Tab 6 at 1; *id.*, Tab 15 at 47. At the time of his retirement from the civil service, the appellant made a deposit of \$697.32 under [5 U.S.C. § 8422](#)(e) for his military service with the Navy which increased his creditable service and effectively increased his disability retirement annuity. *Id.*, Tab 15 at 2, 53.

¶3 In January 2008, Congress amended the National Defense Authorization Act, which revised the eligibility requirements for CRSC in order to expand coverage for veterans, like the appellant, who suffered a disabling combat-related injury. See [10 U.S.C. § 1413a](#). According to the appellant, he read an article in *Shift Colors*, a newsletter published by a veterans organization, informing retirees of the relevant CRSC changes:

Retirees who have waived their retired pay in order to include their military service as part of a civil-service retirement program are not eligible for CSRC, but they may request through the Office of Personnel Management (OPM) to separate their military time from their civil service retirement, which will restore their eligibility.

IAF, Tab 15 at 58; see [www.corpsman.com/attachments/0908/shiftcolorssummerfinal.pdf](http://www.corpsman.com/attachments/0908/shiftcolorssummerfinal.pdf) at 5.

¶4 On October 9, 2008, after reading the *Shift Colors* article, the appellant sent a letter to OPM requesting that OPM separate his military service from his civilian service for purposes of calculating his FERS annuity so that he could “apply for the CRSC.” IAF, Tab 6, Subtab 5 at 3. OPM did not respond to the

appellant's written request or the numerous follow-up phone calls he made to check the status of his request. *Id.* at 1-2. In October 2009, after the appellant asked his Senator to intervene, OPM summarily denied the appellant's request. *Id.* at 1-2; IAF, Tab 6, Subtab 4. The appellant requested reconsideration, and in a March 1, 2010 letter, OPM affirmed its initial decision, noting that "[t]here is no provision of retirement law that permits the paid post-1956 military service that was used to increase your annuity benefits . . . to be eliminated from your annuity computation." IAF, Tab 6, Subtab 2 at 1. The appellant filed a timely appeal with the Board.<sup>1</sup> *Id.*, Tab 1.

¶5 The administrative judge reversed OPM's reconsideration decision. IAF, Tab 18, Initial Decision at 10. The administrative judge found that [5 U.S.C. § 8465](#) plainly provides that the appellant may waive all or any part of his FERS annuity by filing a signed request with OPM. Initial Decision at 7. The administrative judge further found that the appellant's October 9, 2008 letter requesting that OPM separate his "military time" from his "civil service retirement" for purposes of calculating his FERS annuity was an appropriate written waiver under [5 U.S.C. § 8465\(a\)](#). Initial Decision at 7. The administrative judge rejected OPM's reliance on [5 U.S.C. §§ 8401\(19\)](#) and 8422(e), finding that these provisions "do not, in any conceivable way, discuss or address the issue of whether an annuitant may separate his civilian and military service in order to waive that portion of his FERS annuity that is based on military service credit." Initial Decision at 8-9. Lastly, the administrative judge found OPM's "actions under the circumstances unacceptable and inexcusable," given OPM's failure to respond to the appellant's request, its denial of his initial and reconsideration requests in summary fashion without a rational basis, and its

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<sup>1</sup> Although the appellant initially requested a hearing, IAF, Tab 1 at 5, he later withdrew his request for a hearing, *id.*, Tab 16 at 2.

inexplicable reliance on completely inapplicable statutory provisions.<sup>2</sup> *Id.* at 9-10. The administrative judge thus ordered OPM to process the appellant's request. *Id.* at 10.

¶6 OPM filed a petition for review. Petition for Review (PFR) File, Tab 1. The appellant filed a response in opposition. *Id.*, Tab 3.

### ANALYSIS

¶7 In its petition for review, OPM asserts that the administrative judge “erred by relying on the appellant’s claim that his military service must be removed from the computation of his FERS benefit.” PFR File, Tab 1 at 4. OPM asserts that the administrative judge failed to determine whether it is necessary to remove the appellant’s military credit from his FERS benefit before the appellant would be entitled to the CRSC benefit. *Id.* at 5. OPM further asserts that the appellant “need not remove credit for his military service from his FERS disability annuity benefit to receive” the CRSC benefit, and thus it asks the Board to vacate the initial decision. *Id.* at 4. OPM claims that the quoted excerpt from *Shift Colors* is not relevant in the instant case because it “addresses retirees who did waive their military retired pay to credit military service in a civil service annuity.” *Id.* at 5. It argues that under [5 U.S.C. § 8411\(c\)\(2\)](#), an employee receiving military retired pay based on a service-connected disability incurred in combat is not required to waive his military retired pay to credit that military service for his FERS retirement.<sup>3</sup> PFR File, Tab 1 at 5.

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<sup>2</sup> The Board shares the same concerns expressed by the administrative judge. OPM’s failure to provide timely, considered responses to the appellant’s inquiries and its lack of diligence when providing to the appellant and the Board inaccurate information has resulted in the waste of considerable time and resources by the parties and the Board.

<sup>3</sup> In support of its assertion, and for the first time with its petition for review, OPM submits a declaration from Mr. Leif Larsen, President of the Combat Related Special Compensation Board of the Department of the Navy, who attests that retirees who are found to be eligible for CRSC as a direct result of armed conflict will not be denied payment of CRSC as a consequence of continuing to receive civil service retirement

¶8 Because the appellant, OPM, and the administrative judge seemingly misunderstood the central issues before the administrative judge, i.e., whether the appellant ever waived his military retired pay to credit that military service toward his FERS retirement and whether he is required to waive that portion of his FERS annuity that is based on his military service in order to qualify for CRSC benefits, we GRANT OPM’s petition for review. For the reasons set forth below, we find that the appellant did not waive his military retired pay to credit that military service toward his FERS annuity, and accordingly he need not waive his civil service retirement credit for his military service in order to be eligible for CRSC benefits.

¶9 Under [5 U.S.C. § 8411](#)(c), creditable service for purposes of computing a retirement annuity includes, inter alia, “each period of military service performed after December 31, 1956, and before the separation on which title to annuity is based, if a deposit (including interest, if any) is made with respect to such period in accordance with section 8422(e).”<sup>4</sup> [5 U.S.C. § 8411](#)(c)(1)(B). Section 8411(c) further provides that “[i]f an employee or Member is awarded retired pay based on any period of military service, the service of the employee or Member may not include credit for such period of military service unless the retired pay is awarded . . . [b]ased on a service-connected disability . . . .” 5 U.S.C. § 8411(c)(2)(A).

¶10 On January 30, 1999, the appellant paid the requisite deposit of \$697.32 for military service he performed after December 31, 1956, specifically for the period from October 14, 1966, through February 26, 1971. IAF, Tab 6, Subtab 5

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credit for their military service. *See* PFR File, Tab 1 at 7-10. We have not considered Mr. Larsen’s declaration as OPM has failed to establish that the information contained in his declaration was unavailable despite due diligence when the record closed below. *See Grassell v. Department of Transportation*, [40 M.S.P.R. 554](#), 564 (1989); *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980).

<sup>4</sup> Section 8422(e) of Title 5 of the U.S. Code pertains to deposits made for military service under FERS, the system under which the appellant retired.

at 6, 8, 16. The appellant's Certified Summary of Federal Service states that the appellant "receive[s] military retired pay[.]" *Id.* at 8. The appellant appears to be operating under the belief that he waived his military retired pay in order to increase his FERS annuity. *See* IAF, Tab 15 at 2-3. However, his Certified Summary of Federal Service states that the appellant has *not* "waived military retired pay to credit military service for FERS retirement." IAF, Tab 6, Subtab 5 at 8. Moreover, in his Application for Immediate Retirement, signed by the appellant on January 19, 1999, he checked the box for "Yes (*Complete Schedule B and attach to this form*)" in response to whether he was receiving or had applied for military retired pay. *Id.* at 5. On Schedule B of his Application for Immediate Retirement, the appellant checked the boxes for "Yes" in response to whether he was receiving or had applied for military retired pay and to whether his military retired pay was awarded for a disability incurred in combat. *Id.* at 6. He checked the box for "No" in response to whether he was "waiving [his] military retired pay . . . in order to receive credit for military service for FERS retirement benefits." *Id.*

¶11 As noted above, while [5 U.S.C. § 8411\(c\)\(2\)](#) provides that a member who is awarded military retired pay may not include credit for such period of military service, it also provides an exception when the retired pay is awarded based on a service-connected disability. [5 U.S.C. § 8411\(c\)\(2\)\(A\)](#). It is undisputed that the appellant has a service-connected disability. *See* IAF, Tab 15 at 54; *id.*, Tab 6, Subtab 3 at 1; *id.*, Tab 1 at 16. Accordingly, because the appellant's military retired pay was awarded based on a service-connected disability, he was not required to waive, nor is there any evidence that he waived, his military retired pay in order to include credit for his period of military service in his FERS annuity.<sup>5</sup> IAF, Tab 6, Subtab 5 at 5-6, 8.

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<sup>5</sup> In completing the appellant's Certified Summary of Federal Service, an OPM Employee Relations Specialist indicated in response to whether the "applicant waived

¶12 CRSC was established effective May 31, 2003, to provide special compensation to members of the uniformed services who have military retired pay reduced by reason of receiving Department of Veterans Administration (VA) disability compensation where a portion of such VA compensation is the result of disabilities that are combat-related. DOD Financial Management Regulations (DODFMR), Volume (Vol.) 7B, Chapter (Ch.) 63 “Combat-Related Special Compensation,” ¶ 630101. “Effective January 1, 2008, eligible members are those entitled to military retired pay for any reason . . . without regard to their years of service and who receive VA compensation for combat-related disabilities that result in offset to military retired pay.” *Id.*, ¶ 630101(C). A member may not be paid CRSC benefits unless he has applied for and elected to receive compensation under the CRSC program by filing an application (DD Form 2860) with the military department from which he retired. *Id.*, ¶ 630401.

¶13 Paragraph 630503, pertaining to entitlement to CRSC benefits, provides that “[a] member must be entitled to retired pay, notwithstanding that such retired pay may be reduced due to receipt of VA disability compensation.” *Id.*, ¶ 630503(A). Paragraph 630503 further provides that

- B. A member who waives retired pay in order to credit military service for the purposes of a civil service retirement, or for any reason other than to receive disability compensation from the VA, is not eligible to receive CRSC payments.
  - 1. If the military service was used to gain title to the civil service retirement, then the member may not revoke the waiver in order to receive the CRSC payments.
  - 2. If the military service was used to increase the civil service retirement and not gain title, then the waiver may be revoked in order to receive the CRSC payments. Notification and approval of the Office of Personnel Management is required.

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military retired pay to credit military service for FERS retirement,” “No (*Includes cases where a waiver is unnecessary.*)”. IAF, Tab 6, Subtab 5 at 8-9 (emphasis in original).

*Id.*, ¶ 630503(B)(1)-(2).

¶14 The *Shift Colors*, newsletter cited previously, summarized paragraph 630503(B), explaining that

Retirees who have waived their retired pay in order to include their military service as part of a civil-service retirement program are not eligible for CRSC, but they may request through the Office of Personnel Management (OPM) to separate their military time from their civil service retirement, which will restore their eligibility.

IAF, Tab 15 at 58; *see* [www.corpsman.com/attachments/0908/shiftcolorssummerfinal.pdf](http://www.corpsman.com/attachments/0908/shiftcolorssummerfinal.pdf) at 5.

¶15 Both the appellant and the administrative judge were mistaken in assuming that the above-quoted excerpt from *Shift Colors* applied to the appellant and that the appellant was required to separate his military time from his civil service retirement in order to be eligible for CRSC benefits. *See* Initial Decision at 5-6; IAF, Tab 15 at 3. As noted above, CRSC was established to provide special compensation to members of the uniformed services who have retired pay reduced by reason of receiving VA disability compensation where a portion of such VA compensation is the result of disabilities that are combat-related. While the appellant's military retired pay may have been reduced or offset due to his receipt of VA disability compensation, *see* IAF, Tab 15 at 60; *id.*, Tab 1 at 2, there is no evidence in the record that suggests that the appellant waived his military retired pay in order to credit military service for the purposes of a civil service retirement, which is the type of waiver to which paragraph 630503(B) applies. *See* DODFMR, Vol. 7B, Ch. 63, ¶ 630503(B).

¶16 Rather, the appellant paid a deposit of \$697.32 in order to receive credit for the military service he performed after December 31, 1956, and he was not required to waive his military retired pay in order to credit military service for the purposes of computing his FERS retirement annuity. *See* [5 U.S.C. §§ 8411\(c\)\(1\)\(B\), \(c\)\(2\)\(A\)](#); IAF, Tab 6, Subtab 5 at 6, 8, 16. Because the

appellant never waived his military retired pay in order to credit his military service, as such a waiver was unnecessary under [5 U.S.C. § 8411\(c\)\(2\)\(A\)](#) as fully discussed above, paragraph 630503(B) is inapplicable to the instant circumstances. Therefore, because the appellant never waived his military retired pay under [5 U.S.C. § 8411\(c\)\(2\)\(A\)](#) and paragraph 630503(B), there is no waiver to be revoked by the appellant or approved by OPM nor must the appellant request OPM to separate his military time from his civil service retirement. *See* DODFMR, Vol. 7B, Ch. 63, ¶ 630503(B)(2).

¶17 Accordingly, we VACATE the initial decision ordering OPM to process the appellant's request to waive that portion of his FERS annuity that is based on credit for his military service solely for purposes of establishing the appellant's eligibility to CRSC benefits. Instead, the appellant should apply for and elect to receive compensation under the CRSC program by filing an application (DD Form 2860) with the Department of the Navy. *See* DODFMR, Vol. 7B, Ch. 63, ¶ 630401. If the appellant believes that his rights and interests in his FERS civil service retirement benefits are otherwise affected in any way, he may file a new inquiry with OPM.

### ORDER

¶18 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

### NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.